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Supreme Court of the United States

OCTOBER TERM, 1936

No. 285

UNITED STATES, EX RELATIONE, GIRARD TRUST COMPANY, Trustee Under the Will of John A. Brown, Jr., Deceased, *Petitioner*,

v.

GUY T. HELVERING, Commissioner of Internal Revenue.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

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Of Counsel.

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v.

GUY T. HELVERING, Commissioner of Internal Revenue.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

May It Please the Court:

The petition of United States, Ex Relatione, Girard Trust Company, as trustee under the will of John A. Brown, Jr., deceased, respectfully shows to this Honorable Court:

A.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

Relator seeks review of a decision of the United States Court of Appeals for the District of Columbia, rendered May 18, 1936 (R. 40), affirming the judgment of the Supreme Court of the District of Columbia, dismissing a petition for

mandamus brought to compel the Commissioner of Internal Revenue to refund overpayments of income taxes in amounts determined by the Board of Tax Appeals. The defense interposed and sustained by the court below was a plea that it would be inequitable to compel refund of these overpayments to the relator because a beneficiary of the trust estate had received erroneous refunds of her income taxes for some of the years involved, as well as for other years, and had failed to pay taxes due for one of these years, the government being barred by the statute of limitations from recovering such erroneous refunds and from collecting such taxes.

The material facts are as follows:

Relator is trustee under the will of John A. Brown, Jr., deceased, who died July 17, 1919, a resident of Newtown Township, Pennsylvania, leaving a last will and codicil thereto, by the terms of which his residuary estate was bequeathed to relator, in trust, to collect the income and, after payment of certain expenses, to distribute the net, to the extent of $200,000 per year, to his widow, Harriet Etting Brown, for life, and any excess above that amount to his children (R. 2-3, 15).

Decedent's widow duly elected to take under the will in lieu of taking the interest otherwise allowed her by the Pennsylvania law, and the property was delivered to relator upon the trusts named in December, 1920, since which time it has continued to act as such trustee (R. 3, 17).

During the years 1924 to 1930, inclusive, relator currently distributed to the widow the entire net income of the trust estate. Pursuant to the requirements of Section 219 of the Revenue Act of 1924 and corresponding provisions of the 1926 and 1928 Acts (see appendix, pp. 25-26), relator duly filed with the Collector of Internal Revenue a return of income for the trust estate for each of such years, deducting from the gross income the amounts so distributed to the widow. The widow, in turn, in her income tax returns, reported all such distributions for the years 1924 to 1927, in-

clusive, and paid taxes thereon. For the years 1928 to 1930, inclusive, she did not include such distributions in her taxable income, and the Commissioner did not require her to do so (R. 3, 17, 24).

On March 15, 1929, the Commissioner of Internal Revenue, pursuant to the provisions of Section 274 of the Revenue Act of 1926, notified relator of alleged deficiencies in income taxes of the trust estate for the years 1924 and 1925, resulting from the Commissioner's disallowance of the deduction of amounts so distributed to the widow. Relator, on May 11, 1929, duly filed with the United States Board of Tax Appeals an appeal from the Commissioner's determination in this regard. The Board on June 23, 1931, entered a decision sustaining the Commissioner's determination that such deductions should be denied, and computing the resulting deficiencies at $30,278.28 for 1924 and $16,580.85 for 1925. Relator, on December 21, 1931, filed with the United States Circuit Court of Appeals for the Third Circuit a petition for review of the Board's decision, and on April 26, 1933, the appellate court reversed the Board (R. 3-4, 18). Meanwhile, pending review, relator on February 10, 1932, had paid the amounts determined as deficiencies by the Board, together with interest of $18,279.01 (R. 4, 18), in lieu of filing a bond to stay collection, under the provisions of Section 1001 of the Revenue Act of 1926 (see appendix, p. 23).

Pursuant to the mandate of the appellate court, the Board on July 7, 1934, entered its decision, wherein it ordered and decided that there were no deficiencies due from relator for 1924 or 1925, but that in fact, there were overpayments for such years in the respective amounts paid on February 10, 1932 (R. 4, 18). That decision became final on August 7, 1934, under the provisions of Section 1005 of the 1926 Act (see appendix, p. 25).

A similar deficiency notice was sent relator on January 22, 1931, asserting a deficiency for the year 1928. On March 6, 1931, relator appealed to the Board of Tax Appeals, which

entered its decision, on stipulation of the parties, on September 29, 1934, determining that relator had overpaid its taxes for that year in the amount of $4,376.29. No petition for review of that decision was filed (R. 4-5, 19), and it became final on December 29, 1934, under section 1005, *supra* (see appendix, p. 25).

There are no income, war-profits, or excess-profits taxes, or instalments thereof, due from relator, as such trustee, for any year or period (R. 5, 19, 23-25), against which respondent could credit these overpayments. Nevertheless, respondent refused to refund the overpayments in question. Relator's petition for mandamus seeks to compel him to do so. In answer to the petition, respondent denied the Court's jurisdiction (R. 21-22), and defended his failure to refund the overpayments by asserting that such refund would be contrary to equity and good conscience. This defense is based upon the following facts (R. 23-24):

The widow received income from the trust, as aforesaid, and for the years 1924 to 1927, inclusive, paid income taxes thereon. However, she later filed claims for refund of most of the taxes so paid, on the ground that, as a matter of law, this income represented the return to her of the value of her dower and statutory rights, which she had relinquished when she elected to take under decedent's will, and therefore was not taxable income in her hands. The Commissioner of Internal Revenue considered these claims and allowed substantially, though not exactly, the amounts claimed, refunding to her in September, 1931, an aggregate of $60,636.12 as taxes paid on such income for the years 1924 to 1927, inclusive, together with statutory interest thereon. Of this amount, the refund of tax for 1924 was $24,807.99 and for 1925 $11,903.18.

During 1928, the widow received income from the trust, but in good faith did not treat it as taxable in her return. If it had been included, the tax thereon would have been $4,376.39. The Commissioner and his agents examined this

return and, with full knowledge of the facts, accepted it as correct (R. 24).

It is said that the Commissioner's action in refunding taxes to the widow for the years 1924 to 1927, inclusive, and in approving her 1928 return, resulted from an error of law on his part, honestly concurred in by the widow; that she has been unjustly enriched by reason of these circumstances; that she and the relator "are the same parties in interest"; that the relief herein prayed, if granted, would inure to her sole benefit; and that, in equity and good conscience, respondent should not be directed to refund to relator any amount in excess of the amounts now alleged to be justly due and owing from the widow (R. 25).

A demurrer to the answer (R. 26-29) was overruled by the trial court and, the relator electing to stand thereon, the petition was dismissed (R. 29). On appeal by relator, the Court of Appeals, while overruling respondent's objections to the jurisdiction (R. 35-37), sustained the validity of the last-mentioned plea and affirmed the order of dismissal (R. 40).

B.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

1. The decision below is in conflict with the decision of the United States Circuit Court of Appeals for the Second Circuit in *United States* v. *Irving Trust Company*, 77 Fed. (2d) 852, in that the court below held that the Government may use a claim barred by the statute of limitations as a set-off against a taxpayer's claim for refund of an overpayment of tax for a different taxable year.

2. The court below has decided the following important questions of federal law which have not been, but should be, settled by this court:

(a) That refund of an overpayment of taxes to a taxpayer who, with the acquiescence of the United States, in good faith and without misrepresentation, failed to pay

other taxes of equal amount now barred from collection by the statute of limitations, would be "inequitable" and will not be required by writ of mandamus;

(b) That the Commissioner may refuse, despite the provisions of Section 1001(d) of the Revenue Act of 1926, to credit or refund the amount of a tax deficiency determined by the Board of Tax Appeals and paid in lieu of bond pending review by a Circuit Court of Appeals, where the court disallows the deficiency determined by the Board;

(c) That, after a final decision of the Board of Tax Appeals that a taxpayer has overpaid taxes, the Commissioner, in a proceeding against him to require a refund of the overpayment, may defeat such refund on grounds not asserted before the Board; and

(d) That a valid claim for refund of overpayment of income taxes by a trustee, in its fiduciary capacity, may be set off or credited against or absorbed by a claim on behalf of the Government against a beneficiary of the trust.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Court of Appeals for the District of Columbia, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 6618, October Term, 1935, United States Ex Relatione, Girard Trust Company, Trustee under the Will of John A. Brown, Jr., Deceased, appellant, v. Guy T. Helvering, Commissioner of Internal Revenue, appellee, and that the said judgment may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

GIRARD TRUST COMPANY, Trustee Under the Will of John A. Brown, Jr., Deceased,

By H. C. KILPATRICK,
Counsel for Petitioner.

Supreme Court of the United States

OCTOBER TERM, 1936

No. .....

UNITED STATES, EX RELATIONE, GIRARD TRUST COMPANY, Trustee Under the Will of John A. Brown, Jr., Deceased, *Petitioner*,

v.

GUY T. HELVERING, Commissioner of Internal Revenue.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

I.

THE OPINIONS OF THE COURTS BELOW.

There was no opinion by the Supreme Court of the District of Columbia. The opinion of the United States Court of Appeals for the District of Columbia has not yet been officially reported, but appears in the record at pages 33 to 40.

II.

JURISDICTION.

1. The jurisdiction of this Honorable Court is invoked under the provisions of the Judicial Code, Section 240, as amended by Act of Congress, February 13, 1925, 43 Stat. 938 (U. S. C. A., Tit. 28, Sec. 347).

2. The judgment sought to be reviewed was entered May 18, 1936 (R. 40).

III.

STATEMENT OF THE CASE.

The case was tried and decided on demurrer to the answer (R. 29). A concise statement of the case has been given under the heading "A" in the petition for certiorari (pages 1-5, *supra*), and in the interest of brevity is not repeated here.

IV.

SPECIFICATION OF ERRORS INTENDED TO BE URGED.

(1) The Court of Appeals erred in holding that a trustee is not entitled to a writ of mandamus commanding the Commissioner of Internal Revenue to refund overpayments of income tax found to be due it by final decisions of the Board of Tax Appeals, if it appears that a beneficiary of the trust, with the acquiescence of the United States, in good faith, and without intent to defraud, obtained erroneous refunds of income tax for some years and failed to pay income tax for other years, which in the aggregate exceeded the amount of the overpayments due the trustee and which are barred from recovery from the beneficiary by the applicable statutes of limitations.

(2) The Court of Appeals erred in holding that a claim of the United States to recover erroneously refunded income tax, which is barred from collection by the statute of limitations, may be set off against a valid claim for refund of income tax for a different taxable year.

(3) The Court of Appeals erred in holding that a court may disregard statutory limitations on the assessment and collection of taxes and recovery of erroneous refunds of taxes, because it believes that the observance of such limitations would be inequitable, there being no charge of fraud or bad faith on the part of the taxpayer.

(4) The Court of Appeals erred in holding that, where a taxpayer, in lieu of filing bond, pays a deficiency determined by the Board of Tax Appeals pending review of the Board's decision by a circuit court of appeals, and where the court disallows the deficiency so determined by the Board, the Commissioner may not be required to refund such payment to the taxpayer.

(5) The Court of Appeals erred in holding that after a final decision of the Board of Tax Appeals that a taxpayer has overpaid taxes, the Commissioner may, in a proceeding against him to require refund of such overpayments, defeat such refund on grounds not asserted before the Board.

(6) The Court of Appeals erred in holding that a valid claim for refund of overpayments of income taxes by a trustee, in its fiduciary capacity, may be set off or credited against a claim of the government against a beneficiary of the trust.

(7) The Court of Appeals erred in affirming the judgment of the Supreme Court of the District of Columbia.

V.

STATUTES INVOLVED.

The statutes involved, and the proposition for which each is cited, appear in the appendix, pp. 21-26, *infra*.

VI.

ARGUMENT.

1. The Decision Below is in Conflict With the Decision of the United States Circuit Court of Appeals for the Second Circuit in United States v. Irving Trust Company, 77 Fed. (2d) 852.

In the *Irving Trust* case a bankrupt corporation had overpaid its income taxes for 1931, but three-fourths of the amount of the overpayment (the tax having been paid in instalments) was barred from refund because of the bank-

rupt's failure to file a claim within the prescribed statutory period. The bankrupt had underpaid its taxes for 1926, and the government filed a timely claim for the deficiency in the bankruptcy proceeding. The trustee moved to set off the entire 1931 overpayment against the 1926 deficiency. This was allowed by the trial court, but the Court of Appeals reversed, holding that only that part of the overpayment which was not barred from refund could be so set off, on the ground that an overpayment "cannot be used as a set off unless it constitutes an allowable refund." The decision of this Court in *Bull* v. *United States*, 295 U. S. 247, 79 L. ed. 1421, was distinguished on the ground that the 1931 overpayment did not arise out of some feature of the transaction upon which the government's claim for 1926 was grounded.

In the instant case the overpayments by petitioner were overpayments for the years 1924, 1925 and 1928, aggregating in principal and interest, $69,514.53 (R. 4, 5),[1] whereas the claims of the government against the beneficiary for the same years aggregated only $53,476.84 (R. 24).[2] The Commissioner's refusal to refund the excess was approved because of claims against the widow for 1926 and 1927 aggregating $29,124.40 (R. 24).[3] Conceding for purposes of the present point the identity of trustee and beneficiary, the decision in the instant case is squarely in conflict with

[1]

Year	Principal	Interest	Total
1924	$30,278.28	$12,453.91	$42,732.19
1925	16,580.85	5,825.10	22,405.95
1928	4,376.39	.....	4,376.39
		Aggregate	$69,514.53

[2]

1924	24,807.99	8,762.62	33,570.61
1925	11,903.18	3,626.66	15,529.84
1928	4,376.39	.....	4,376.39
			$53,476.84

[3]

1926	12,958.15	3,173.77	16,131.92
1927	10,966.80	2,025.68	12,992.48
		Aggregate	$29,124.40

United States v. *Irving Trust Co., supra*, in that it permits a stale claim for erroneously refunded income taxes for one year to be interposed as a defense to the refund of admitted overpayments of such taxes for other and different taxable years. The cases are parallel because, as pointed out by the court below, the determination of relator's right to a writ of mandamus is governed by equitable principles, and the same principles apply to bankruptcy proceedings. *Local Loan Co.* v. *Hunt*, 292 U. S. 234, 240, 78 L. ed. 1230, 1233.

In this respect the decision below is without precedent, and invites litigation in every case where either the taxpayer or the taxing officials can discover barred claims for any period in the remote past. Two eminent writers on the subject (*McGuire and Zimet, "Hobson's Choice and Similar Practices in Federal Taxation", XLVIII Harv. Law Rev., 1279, 1327*) have tersely described the effect of such a decision:

> "Start jumping the boundaries of the very year to which the refund claim applies, and there will be no stopping point short of the extreme temporal limits of financial relations between taxpayer and government. Such acrobatics outrage conventional notions of legal repose."

2. Important Questions of Federal Law Which Should Be Settled.

The court below has decided the following important questions of federal law which have not been, but should be, settled by this Court:

(a) That a court may disregard statutory limitations on the assessment and collection of taxes and recovery of erroneous refunds of taxes, because it believes that the observance of such limitations would be inequitable, there being no charge of fraud or bad faith on the part of the taxpayer.

Under Sections 607 and 609 of the Revenue Act of 1928 (appendix, p. 21), any tax assessed or paid after the expiration of the applicable period of limitation, whether originally due or not, and whether paid voluntarily or involuntarily, must be credited or refunded, and any attempt to accomplish collection of a stale claim by credit against an amount due the taxpayer is denounced as void. Where such a credit is made the taxpayer may sue and recover the amount credited, regardless of his original liability to pay the barred taxes. *United States* v. *John Gallagher Co.*, 83 Fed. (2d) 368. The decision of the court below that the Commissioner, although thus denied the right to *credit* an overpayment against a barred deficiency claim, may defeat recovery of the overpayment upon a mere showing that such a barred claim exists, is, to say the least, anomalous. *Graham* v. *Goodcell*, 282 U. S. 409, 423, 75 L. ed. 415, 437.

Obviously, had the beneficiary here paid her taxes after the time for assessment and collection had expired, the Commissioner would have no ground whatever for refusing payment of the refunds due the petitioner. But, under Section 607, the beneficiary could then recover her payment without question, because paid after the period of limitations, and the result would be exactly the same as that which the Court of Appeals has denounced as unconscionable. The result in each instance flows from statutory provisions that official inaction over a stated period of time shall wipe out all liability on the part of the taxpayer. *Russell* v. *United States*, 278 U. S., 181, 187, 73 L. ed. 255, 257.

In short, the decision below denounces the inevitable operation of a clear statutory provision as "inequitable", and brands as "unconscionable" the petitioner's demand that the statute be obeyed. In this respect the decision is wholly at variance with numerous decisions that a tax collected after the bar of the statute has fallen must be refunded. *Cf. Bowers* v. *N. Y. Albany Lighterage Co.*, 273 U. S. 346, 71 L. ed. 676.

In *Toraway Mills* v. *United States*, 61 Ct. Cls. 363, 373, it was held that a taxpayer could not recover taxes paid after limitation on collection had expired, unless he could show that "the government *ex aequo et bono* is bound to refund the amount which he paid." Although that decision was prior to the enactment of Sections 607 and 609 of the 1928 Act, above discussed, this Court reversed on confession of error by the Solicitor General, 273 U. S. 781, 71 L. ed. 889. Since that time, there has been no dissent from the view that a tax collected after the bar of the statute has fallen must be refunded, without regard to any supposed "equities" arising from the fact that the tax was originally due. *Russell* v. *United States, supra; United States* v. *American Exchange Irving Trust Co.*, 43 Fed. (2d) 829, 830; *Ellay Co.* v. *Bowers*, 25 Fed. (2d) 637, 638-9; *Brewerton* v. *United States*, 9 Fed. Supp. 502, 508; *Daube* v. *United States*, 1 Fed. Supp. 771, affirmed 289 U. S. 367, 77 L. ed. 1261.

When we consider the power given the Commissioner to levy jeopardy assessments,[4] his action not being subject to judicial review,[5] it will be apparent that the decision below permits the Commissioner to avoid the limitations on assessment at will. That is, if he finds that the statute bars collection of a 1932 tax, he may levy and collect a jeopardy assessment on arbitrary grounds for a subsequent year not so barred, and in defense of a suit for refund of the latter, rely upon the "equitable" consideration that the barred claim for 1932 exceeds in amount the valid claim for refund of taxes for the later years. If such results are to follow the decision below, the legislative purpose "to require more prompt action upon the part of the Commissioner and Collectors", and "to protect taxpayers against any proceeding whatsoever for the collection of tax claims not made

[4] Title 26 U. S. C. A., Sec. 273 and "Historical Note".

[5] *The Foundation Co.* v. *United States*, decided by the Court of Claims June 1, 1936, not yet officially reported.

and pressed within" the statutory period (*Bowers* v. *N. Y. & Albany Lighterage Co., supra*) will be frustrated.

"High public interests make it necessary that there be stability and certainty in the revenues of government. These ends are not susceptible of attainment if periods of limitation may be disregarded or extended." *Daube* v. *United States*, 289 U. S. 367, 372, 77 L. ed. 1261, 1264. The statutory limitation upon collectibility of taxes, in the absence of fraud or conscious deception," may not give way to an elusive concept of fairness." *Sugar Creek Coal & Mining Co.* v. *Commissioner*, 31 B. T. A. 344, 347.

(b) That, where a taxpayer upon appeal from the Board of Tax Appeals, in lieu of filing bond, pays the deficiency determined by the Board, and the appellate court thereafter disallows the deficiency, the Commissioner may not be required to refund the payment to the taxpayer.

Section 1001 (appendix, p. 23) prescribes the method for judicial review of decisions of the Board of Tax Appeals. The taxpayer may file a surety bond and stay collection, or he may pay the deficiency pending review. If he adopts the latter course, and if the court disallows the deficiency determined by the Board, his deposit is to be returned to him by credit or refund "without the making of claim therefor." The intention of Congress seems clear: that such a payment pending review shall be treated as being a deposit "in lieu of bond", as the opinion below (R. 34-35) describes it. However, the court below holds that, even where there is no right to credit, the Commissioner may refuse refund of such a payment on the basis of a defunct and unenforceable claim of the government against the taxpayer for other years.

If payment of a deficiency pending review is to lift the bar of the statute of limitations and place upon the taxpayer the burden of defending not alone the immediate threatened imposition, but any and all barred claims for

any year in the remote past that government officials might chose to assert, the result will be that no taxpayer will dare adopt this alternative, which apparently was provided for his benefit. Furthermore, under this theory, questions presented to the courts of appeal and to this Court in cases originating in the Board of Tax Appeals might be moot unless the taxpayer were able to furnish a surety bond to stay collection.

To say that the "inequity" of permitting a taxpayer to escape payment of a liability justifies such a rule is to say that statutes of limitation, designed to put an end to disputes, may be ignored wherever the barred claim was originally a valid one, but may be enforced only where the alleged debtor is able to show that he never owed the money and therefore does not need the protection of the statute. Aside from this absurd consequence, the decision below overlooks the obvious inequity inherent in a situation where the taxpayer, invited by statute to pay the amount in controversy pending settlement of his rights, upon accepting that invitation, finds himself entrapped by the statute and his money retained to satisfy collateral and otherwise unenforceable claims.

(c) That, after a final decision of the Board of Tax Appeals that a taxpayer has overpaid taxes, the Commissioner, in a proceeding against him to require a refund of the overpayment, may defeat such refund on grounds not asserted before the Board.

In each of the proceedings before the Board of Tax Appeals, the Board entered a decision that relator had overpaid its taxes. In each case, that decision has long since become final. Section 284 of the 1926 Act and Section 322 of the 1928 Act (appendix, pp. 24-25) provide that amounts so determined shall be credited or refunded to the taxpayer. But the Commissioner here has refused either to credit or refund such overpayments, and seeks to excuse

his inaction by asserting in this proceeding claims against a beneficiary of the trust, not only for taxes but for the recovery of erroneous refunds for the same years in which relator overpaid its taxes (1924, 1925 and 1928), as well as claims for erroneous refunds for other years (1926 and 1927). This defense, sustained by the Court of Appeals, assumes the identity of trustee and beneficiary as the same "taxpayer", a point hereinafter discussed. If this assumption be invalid, of course, the decision is clearly wrong. However, if it be valid, other serious questions immediately arise.

As to the years involved in the proceedings before the Board, if the trustee and the beneficiary constituted one and the same taxpayer, the Commissioner could have asserted before that tribunal his claims against the beneficiary, just as he might have defended his position on the basis of any error in computation of the income of the taxpayer. *James P. Gossett*, 22 B. T. A. 1279, 1284. Having failed then to assert this defense, may the Commissioner now be heard to say, in effect, that there were no actual overpayments for the years in question, because of underpayment by the beneficiary?

That the doctrine of *res judicata*, or estoppel by judgment, applies to the decisions of the Board is definitely settled by the decision in *Tait* v. *Western Maryland Ry. Co.*, 289 U. S. 620, 77 L. ed. 1405. "Except in special cases the plea of *res judicata* applies, not only to points upon which the court was actually required to form an opinion and pronounce judgment, but to every point which properly belonged to the subject of the allegation, and which the parties, exercising reasonable diligence, might have brought forward at the time." *Gould* v. *Evansville & Crawfordsville R. Co.*, 91 U. S. 526, 533; 23 L. ed. 416, 418.

In *Old Colony Trust Company* v. *Commissioner*, 279 U. S. 716, 73 L. ed. 918, in discussing appeals to the Board and review of the Board's decisions by the courts, it was said:

"The complete purpose of Congress to provide a final adjudication in such proceedings, binding all parties, is manifest."

The decision below, therefore, appears to be based upon an entirely different concept of the effect of decisions of the Board than that appearing in the opinions of this Court dealing with the subject. If the decision below is not reviewed, doubt and uncertainty will exist as to the extent to which final decisions by the Board, and by the courts on review, may be attacked in collateral proceedings. The most obvious effect will be for the taxpayer to seek to avoid payment of a deficiency determined by final decision of the Board on the basis of some defense overlooked at the time of trial by the Board.

(d) That a valid claim for refund of an overpayment of income taxes by a trustee, in its fiduciary capacity, may be defeated by a claim on behalf of the government against a beneficiary of the trust.

Section 219 of the Revenue Act of 1924 (identical in substance with Section 219 of the 1926 Act and Sections 161-162 of the 1928 Act—see appendix, p. 25) subjects the income of trust estates to the income taxes levied on individuals, but uses a different method of computing income. The fiduciary makes a separate return and pays the tax on all trust income except that which is distributable to the beneficiary. Distributable trust income is included in the beneficiary's return, along with income from all other sources, and may be offset by deductions having no connection with trust income. Thus there may be wide variance between the rate of tax applicable to trust income taxable to the estate and such income taxable to the beneficiary. Controversy over the taxable income of the one may extend far beyond the period of limitation on assessment against or refund to the other. It has been held repeatedly, by admin-

istrative rulings, as well as by judicial decisions, that the revenue laws deal with trustee and beneficiary as separate taxpayers, and that mere identity of economic interest does not permit the mingling of the accounts of separate taxpayers, either for the purpose of computing tax liability or for the purpose of determining the right of one of them to a refund. In *I. T. 2020,* Internal Revenue Cumulative Bulletin III-1, page 348, it was held that an overpayment of income taxes by the executor and sole beneficiary of a trust estate for 1918 could not be applied against additional taxes due for the same year by the estate. The Circuit Court of Appeals for the Fifth Circuit reached the same conclusion in *Wynne et al.* v. *Commissioner,* 77 Fed. (2d) 473, as did Judge Dickinson of the Eastern District of Pennsylvania in *Arnold* v. *United States,* C. C. H. 1935 Fed. Tax Serv., Vol. 3-A, p. 9382.[6] Conversely, an overpayment by the fiduciary may not be credited against a deficiency due by the beneficiary. *Roebling* v. *Commissioner,* 28 B. T. A. 644, 656. This Court, in *Anderson* v. *Wilson,* 289 U. S. 20, 77 L. ed. 1004, held that the income beneficiary of a trust estate could not deduct from gross income a pro rata part of the loss realized upon a sale by the trustee of part of the corpus of the estate.

All of these decisions are based squarely upon the ground that fiduciary and beneficiary are separate taxpayers. In the last cited case, this Court took cognizance of the argument that the result might involve hardship or inequity, saying (289 U. S. 27):

> "• • • In so ruling we do not forget that the trust is an abstraction, and that the economic pinch is felt by men of flesh and blood. Even so, the law has seen fit to deal with this abstraction for income tax purposes as a separate existence, making its own return under the hand of the fiduciary and claiming and receiving its own appropriate deductions. • • • We do not pause to consider whether a statute differently conceived and

[6] Pending on appeal to the Circuit Court of Appeals for the Third Circuit.

framed would yield results more consonant with fairness and reason. We take the statute as we find it."

The decision of the Circuit Court of Appeals for the First Circuit in *White* v. *Stone*, 78 Fed. (2d) 136,[7] was the first case in which a contrary view was expressed with reference to trustee and beneficiary. That decision was followed in *First National Bank of Birmingham* v. *United States*, 12 Fed. Supp. 301 (D. C. Ala.).[8] In each of these cases the government's claims against the beneficiary were claims for taxes and were confined to the taxable years for which the trustee had overpaid its taxes, whereas in the instant case the claims are for recovery of erroneous refunds as well as for taxes, and cover years other than those for which the trustee paid excessive taxes.

More recently, this Court in *Hulburd* v. *Commissioner*, 296 U. S. 300, 80 L. ed. 166, held that a deficiency erroneously asserted against the executors of an estate in their fiduciary capacity could not form the basis for a judgment of deficiency against one of the executors in his individual capacity as a legatee. In that case, as in the instant case, the Commissioner based his claim upon an alleged right of recoupment, and relied upon *White* v. *Stone*, *supra*.

There are numerous cases pending in District Courts involving the same kind of question.[9] In view of the pronouncements of this Court in *Anderson* v. *Wilson* and *Hulburd* v. *Commissioner*, *supra*, it seems reasonable to predict that there will be conflicting decisions on the point. A review of the question by this Court at this time would obviate much unnecessary litigation.

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[7] Certiorari denied (56 Sup. Ct. 112), but time for filing petition for rehearing extended to Nov. 2, 1936. See 56 Sup. Ct. 167, 245, and 950.

[8] Pending on appeal to the Circuit Court of Appeals for the Fifth Circuit.

[9] See list of such cases appended to brief in support of petition for certiorari in Stone v. White, No. 202, Oct. Term, 1935.

(e) Summary.

The questions above discussed are important questions of federal law which constantly will recur in the administration of the revenue laws. None of these specific questions has been considered by this Court, but the decision below is inconsistent with numerous decisions of this Court and of subordinate federal courts upon related questions, with the result that great confusion and doubt now exist concerning the effect of statutes of limitation upon the rights of the government and of taxpayers growing out of claims for deficiencies and refunds of federal taxes, as well as claims for the recovery of erroneous refunds. The decision also creates confusion with reference to the rights and liabilities created by final decisions of the Board of Tax Appeals.

VII.

CONCLUSON.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, in order that the conflict of the decision below with the decision of the Circuit Court of Appeals for the Second Circuit may be settled, and in order that the several novel and important questions of federal law which are decided by the Court of Appeals herein may be settled by this Court; and that, to such an end, a writ of certiorari should be granted and this Court should review the decision of the United States Court of Appeals for the District of Columbia and finally reverse it.

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APPENDIX.

Pertinent Statutory Provisions and Propositions for Which Cited.

(Italics Supplied)

I

Where a tax is paid after the period for collection has expired, it must be refunded.

Sec. 607, Revenue Act of 1928; Title 26 U. S. C. A. (1925 Ed.) Sec. 2607:

> "Any tax • • • assessed or paid • • • after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and *shall be credited or refunded to the taxpayer* if claim therefor is filed within the period of limitation for filing such claim."

II

An attempted credit of an overpayment against a barred tax liability is void.

Sec. 609(a), Revenue Act of 1928; Title 26 U. S. C. A. (1925 Ed.) Sec. 2609(a):

> "• • • Any credit against a liability in respect of *any taxable year shall be void* if any payment in respect of such liability would be considered an overpayment under section 2607. • • •"

III

The statutory period for assessment against the widow had expired when this suit was filed.

Sec. 277, Revenue Act of 1924; Title 26 U. S. C. A. (1925 Ed.) Sec. 1057 note:

> "• • • The amount of income taxes imposed by this chapter *shall* be assessed within four years after the return was filed, *and no proceeding in court* for the

collection of such taxes *shall be begun* after the expiration of such period."

Sec. 277, Revenue Act of 1926; Title 26 U. S. C. A. (1925 Ed.) Sec. 1057 (a)(1):

"• • • The amount of income taxes imposed by this chapter *shall* be assessed within three years after the return was filed, and *no proceeding in court* without assessment for the collection of such taxes *shall be begun* after the expiration of such period."

Sec. 275, Revenue Act of 1928; Title 26 U. S. C. A. (1925 Ed.) Sec. 2275 (a):

"The amount of income taxes imposed by this title *shall* be assessed within two years after the return was filed, and *no proceeding in Court* without assessment for the collection of such taxes *shall be begun* after the expiration of such period."

IV

The statutory period for bringing suit against the widow for recovery of refunds to her had likewise expired.

Sec. 610, Revenue Act of 1928; Title 26 U. S. C. A. (1925 Ed.) Sec. 2610:

"(a) Any portion of an internal revenue tax • • • refund of which is erroneously made, within the meaning of section 2608 (Note 1) after May 29, 1927, may be recovered *by suit brought in the name of the United States*, but only if such suit is begun *within two years after the making of such refund.*

"(b) Any portion of an internal revenue tax • • • which has been erroneously refunded (if such refund would not be considered as erroneous under section 2608) may be recovered *by suit brought in the name of the United States*, but only if such suit is begun before

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Note 1: Section 2608 provides that a refund made (1) after the expiration of the time for filing claim, where no claim was filed, or (2) after the expiration of the time for filing suit upon a rejected claim, where no suit was filed, shall be considered erroneous.

the expiration of *two years after the making of such refund or before May 1, 1928*, whichever date is later • • •".

V

Where a deficiency determined by the Board is paid pending court review and the appellate court disallows such deficiency, the amount so paid must be credited or refunded to the taxpayer.

Sec. 1001, Revenue Act of 1926 as amended by Revenue Act of 1928; Title 26 U. S. C. A. (1925 Ed.) Sec. 1224:

"(a) The decision of the Board rendered after February 26, 1926 • • • may be reviewed by a Circuit Court of Appeals • • • if a petition for such review is filed by either the Commissioner or the taxpayer within six months after the decision is rendered.

• • • • • • • • • •

"(c) Notwithstanding any provision of law imposing restrictions on the assessment and collection of deficiencies, such review shall not operate as a stay of assessment or collection of any portion of the amount of the deficiency determined by the Board unless a petition for review • • • is duly filed by the taxpayer, and then only if the taxpayer • • • has filed with the Board a bond • • • conditioned upon the payment of the deficiency as finally determined • • •.

"(d) In cases where assessment or collection has not been stayed by the filing of a bond, then if the amount of the deficiency determined by the Board, is disallowed in whole or in part by the court, *the amount so disallowed shall be credited or refunded to the taxpayer without the making of claim therefor.* • • •"

VI

Decisions of the Board are final and binding on all parties.

Sec. 274, Revenue Act of 1926; Title 26 U. S. C. A. (1925 Ed.) Sec. 1048, 1048a (Note 2):

Note 2: By Section 283 of the 1926 Act, the provisions of section 274 apply to deficiencies asserted for years covered by prior acts, so this section applies to the years 1924 and 1925. Section 272 of the 1928 Act, applicable to the claim for 1928, is substantially identical with section 274 of the 1926 Act, and is not set out here.

"(a) If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this chapter, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within 60 days after such notice is mailed * * *, the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the deficiency * * *.

"(b) If the taxpayer files a petition with the Board, the entire amount redetermined as the deficiency by the decision of the Board which has become final *shall be assessed and shall be paid upon notice and demand from the collector. No part of the amount determined as a deficiency by the Commissioner but disallowed as such by the decision of the Board which has become final shall be assessed or be collected by distraint or by proceeding in court with or without assessment.*"

Sections 284(d) and 284(e) of the 1926 Act; Title 26 U. S. C. A. (1925 Ed.) Sec. 1065:

"(d) If the Commissioner has mailed to the taxpayer a notice of deficiency under section 1048 of this title and if the taxpayer after February 26, 1926, files a petition with the Board of Tax Appeals * * *, no credit or refund in respect of the tax for the taxable year in respect of which the Commissioner has determined the deficiency shall be allowed or made and no suit by the taxpayer for the recovery of any part of such tax shall be instituted in any court except—* * * (1) As provided in subdivision (e) of this section * * *.

"(e) If the Board finds that there is no deficiency and further finds that the taxpayer has made an overpayment of tax in respect of the taxable year in respect of which the Commissioner determined the deficiency, *the Board shall have jurisdiction to determine the amount* of such overpayment, and such amount *shall*, when the decision of the Board has become final, *be credited or refunded to the taxpayer* as provided in subdivision (a). Unless claim for credit or refund, or the petition, was filed within the time prescribed * * * for filing claims, no such credit or refund shall be made of any portion of the tax paid more than four years * * * be-

fore the filing of the claim or the filing of the petition, whichever is earlier." (Note 3)

VII

Board's decision of overpayments for 1924 and 1925 became final on August 7, 1934, and for 1928 on December 29, 1934.

Sec. 1005, Revenue Act of 1926; Title 26 U. S. C. A. (1925 Ed.) Sec. 1228:

"(a) The decision of the Board shall become final—

(1) Upon the expiration of the time allowed for filing a petition for review (Note 4), if no such petition has been duly filed within such time • • •"

• • • • • • • • • •

"(c) If the decision of the Board is modified or reversed by the Circuit Court of Appeals, and if • • • the time allowed for filing a petition for certiorari has expired and no such petition has been duly filed, • • • then the decision of the Board rendered in accordance with the mandate of the Circuit Court of Appeals shall become final *on the expiration of thirty days from the time such decision of the Board was rendered* • • •."

VIII

Trustee and beneficiary are separate taxpayers.

Sec. 219, Revenue Act of 1924 (identical in substance with Sec. 219 of the 1926 Act, and Sections 161-162 of the 1928 Act); Title 26 U. S. C. A. (1925 Ed.) Sec. 960, note:

"(a) The tax imposed by Parts I and II of this chapter (Note 5) shall apply to the income of estates or of any kind of property held in trust, including—

• • • • • • • • • •

Note 3: For the taxable year 1928 Section 322 of the 1928 Act (Title 26 U. S. C. A. (1925 Ed.) Sec. 2322 (d)) contains substantially the same provisions as are set out above from Section 284 of the 1926 Act, except that the period of limitation is two years.

Note 4: Three months, under sec. 1101 of 1932 Act; Title 26 U. S. C. A. (1934 Ed.) sec. 642.

Note 5: I. e., the income tax on individuals.

(2) Income which is to be distributed currently by the fiduciary to the beneficiaries • • •.

"(b) Except as otherwise provided in subdivisions (g) and (h) (Note 6) *the tax shall be computed upon the net income of the estate or trust and shall be paid by the fiduciary.* The net income of the estate or trust shall be computed in the same manner and on the same basis as provided in Section 953 • • • (Note 7) except that—

• • • • • • • • •

"(2) There shall be allowed as an *additional* deduction in computing the *net income of the estate or trust* the amount of the income of the estate or trust for its taxable year which is to be distributed currently by the fiduciary to the beneficiaries • • • but the amount so allowed as a deduction *shall be included in computing the net income of the beneficiaries whether distributed to them or not* • • •"

Sec. 2(a)(1) Revenue Acts of 1924 and 1926 (identical with Sec. 701(a) of 1928 Act); Title 26 U. S. C. A. (1925 Ed.) Sec. 1262(a)(1):

"The term 'person' means an *individual*, a *trust or estate*, a partnership, or a corporation."

Sec. 2(a)(9), Revenue Acts of 1924 and 1926 (identical with Sec. 701(a)(13) of 1928 Act); Title 26 U. S. C. A. (1925 Ed.) Sec. 1262(a)(9):

"The term 'taxpayer' means any person subject to a tax imposed by this title."

Note 6: These subdivisions relate to revocable trusts and trusts where income is held for or distributed to the grantor of the trust.

Note 7: Section 953 prescribes the method for computing the net income of an individual.